



VIA E-MAIL AND FIRST-CLASS MAIL

February 28, 2006

Minerals Management Service  
Attention: Rules Processing Team  
381 Elden Street, MS-4024  
Herndon, VA 20170-4817

Re: Alternate Energy-Related Uses on the Outer Continental Shelf  
70 Fed. Reg. 77345 (Dec. 30, 2005)  
Advance Notice of Proposed Rulemaking  
RIN 1010-AD30

To Whom It May Concern:

On behalf of the National Trust for Historic Preservation (National Trust), we appreciate the opportunity to provide comments on the development of a regulatory program to implement portions of the Energy Policy Act of 2005. The National Trust commends the Minerals Management Service (MMS) for embracing its new role under Section 388 of the Act – Alternate Energy-Related Uses on the Outer Continental Shelf. While the National Trust supports the development of alternative energy sources, in order to minimize the harmful impacts of traditional energy development, we encourage MMS to be proactive in the creation and implementation of a comprehensive, well-thought-out regulatory program for the siting, permitting, and operating of these alternate energy sources. Throughout the development of this program, the National Trust would like MMS to take into account its federal responsibilities and requirements under the National Historic Preservation Act (NHPA). 16 U.S.C. §§ 470 to 470w-6. As such, our comments stress the importance of initiating compliance with Section 106 of the NHPA during the early stages of planning.

The NHPA was enacted, in part, to ensure that future generations have a genuine opportunity to appreciate and enjoy the rich heritage of our Nation in the face of ever-increasing development. 16 U.S.C. § 470(b)(5). Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties. *Id.* § 470f. The Federal agency must also afford the Advisory Council on Historic Preservation (ACHP) the opportunity to comment on the undertaking. *Id.*

Section 388(a) of the Energy Policy Act of 2005 amended Section 8 of the Outer Continental Shelf Lands Act (OCSLA) to authorize the Department of the Interior to grant leases, easements or rights-of-way on the U.S. Outer Continental Shelf (OCS) for the development and support of energy resources from sources other than oil and gas and to allow for alternate uses of existing facilities on the OCS. Pub. L. No. 109-58, 119 Stat. 594 (2005).

*Protecting the Irreplaceable*



The granting of private access rights to federal lands of the OCS, including leases, easements or rights-of-way are considered “undertakings” under Section 106. See 36 C.F.R. §§ 800.16(y), 800.5(a)(2)(vii). Therefore, MMS as the lead Federal agency under the Department of Interior, must comply with Section 106 of the NHPA and consider what effects the undertakings will have on historic properties.

It is extremely important that the Federal agency ensures that the Section 106 process is initiated early on in the planning stages - not only because the NHPA requires Section 106 to be completed prior to the issuance of any license, but because early consultation allows for a broad range of alternatives to be considered. 36 C.F.R. § 800.1(c). The Section 106 review process “seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among agency officials and other parties with an interest in the effects of the undertaking on historic properties, commencing at the *early stages* of project planning.” § 800.1(a) (emphasis added). “The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.” *Id.* In other words, MMS must complete the Section 106 process *prior* to issuing leases, easements or rights-of-way.

The responsibilities of MMS increase when dealing with possible impacts to a National Historic Landmark. In that case, the MMS must “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark . . .” 16 U.S.C. § 470h-2(f). MMS shall afford the ACHP an opportunity to comment. *Id.* In addition, MMS shall notify the Secretary of the Interior of the involvement of a National Historic Landmark allowing the Secretary to participate in the consultation. 36 C.F.R. § 800.10(c).

Since all projects under MMS’ purview will be located on the OCS, it is important to examine the underwater cultural properties affected by leases, easements or rights-of-way. The National Trust seeks to ensure that irreplaceable underwater cultural resources are protected and managed as archaeological sites, especially historic shipwrecks. In addition to these underwater resources, MMS should assess the visual intrusion that development of alternate energy sources on the OCS may have on land-side historic properties along the coast.

### **Visual Effects of Off-Shore Projects**

When assessing potential adverse effects, MMS should take note that “an adverse effect is found when an undertaking may alter, *directly or indirectly*, any of the characteristics of a historic property that qualify the property for inclusion in the National Register [of Historic Places] in a manner that would *diminish the integrity of the property’s location*, design, *setting*, materials, workmanship, *feeling or association*.” 36 C.F.R. § 800.5(a)(1) (emphasis added). Since alternate energy sources such as wind farms may include a large number of turbines, it is important to consider how the number, scale, density, and appearance of turbines will visually impact historic properties on the coast. Among the examples given of adverse effects is the “introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” *Id.* § 800.5(a)(2)(v). Since the visual and audible

elements of off-shore undertakings can adversely impact historic properties, both directly and indirectly, MMS must ensure that it will appropriately consider the potential adverse effects these off-shore projects will have on cultural and historic resources. Though the National Trust understands that many of the projects will be reviewed on a case-by-case basis, we recommend that the MMS develop siting guidelines that include procedures to identify and mitigate adverse visual effects to historic properties.

**Program Area: Access to OCS Lands and Resources**

***11. What criteria (e.g. environmental considerations, energy needs, economics) should MMS consider in deciding whether or not to approve the project? What criteria should MMS consider for different competing projects (i.e. wind versus current) for the same site?***

MMS should examine how other federal agencies, such as the National Oceanic and Atmospheric Administration and the National Park Service, have complied with the NHPA, taking into account effects on both terrestrial and submerged archaeological resources. In addition, MMS should consider the Army Corps of Engineers' "public interest" standard for evaluating permit applications, 33 C.F.R. § 320.4, which may provide a useful model for MMS. Prior to authorizing a permit for a proposed activity, the Army Corps evaluates "the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." *Id.* § 320.4(a)(1). "The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments." *Id.* § 320.4(a)(1). The Army Corps lists effects on "historic properties" among the cumulative effects to be considered. *Id.* "Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on" resources with historic significance values. *Id.* § 320.4(e).

Other criteria the Army Corps takes into account prior to issuing a permit include effects on wetlands; fish and wildlife; water quality; historic, cultural, scenic and recreational values; effects on limits of the territorial sea; consideration of property ownership; activities affecting coastal zones; activities in marine sanctuaries; other Federal, State, or local requirements; safety of impoundment structures; floodplain management; water supply and conservation; energy conservation and development; navigation; environmental benefits; economics; and mitigation. *Id.* § 320.4(b)-(r). In addition, "[w]here there are unresolved conflicts as to resource use," the Corps will consider "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work." *Id.* § 320.4(a)(2)(ii). In general, the National Trust believes that the general public interest policies used by the Army Corps to evaluate permit applications are important factors for the MMS to consider in developing its own regulations.

**Program Area: Environmental Information, Management, and Compliance**

***12. What types and levels of environmental information should MMS require for a project?***

MMS should comply with the National Environmental Policy Act of 1969, as amended (NEPA). 42 U.S.C. §§ 4321-4370f (2000). MMS is encouraged to consider its Section 106 responsibilities as early as possible in the planning process. Therefore, an off-shore project

requiring the preparation of an environmental impact statement (EIS) or Environmental Assessment under NEPA should also include consideration of the undertaking's potential effects on historic properties. *Id.* Coordinating the agency's Section 106 review with the requirements of NEPA will allow MMS to "meet the purposes and requirements of both statutes in a timely and efficient manner." 36 C.F.R. § 800.8(a)(1).

***13. What types of site-specific studies should MMS require? When should these studies be conducted? Who should be responsible for conducting these studies?***

MMS needs to consider historic properties that are either eligible or listed on the National Register of Historic Places (National Register). In doing so, MMS "shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background search, consultation, oral history interviews, sample field investigation, and field survey." 36 C.F.R. § 800.4(b)(1). The National Trust applauds the fact that MMS has already conducted archaeological baseline studies of the entire OCS to determine where known historic properties may be located and has outlined archaeologically sensitive areas within the OCS which may contain significant historic properties. Going forward, we ask that MMS continue to seek information from the State Historic Preservation Offices, Indian Tribes and any other parties likely to have information on historic properties within the OCS. *Id.* § 800.4(a)(3).

In addition to studies that may identify historic properties, studies may also be needed to assess the effects of proposed developments on historic properties. These should include visual impact studies, studies evaluating the effect of the undertaking on heritage tourism – both water- and land-based tourism – and studies evaluating socioeconomic impacts on communities, such as impacts on local property values.

It is typical for applicants to be assigned the responsibility and cost of conducting studies that are necessary in order for federal agencies to evaluate the application and its impacts. However, it is important for the regulations to clarify and confirm the agency's ultimate responsibility for all determinations based on the applicant's studies. For example, the Section 106 regulations state:

[T]he agency official may use the services of applicants, consultants, or designees to prepare information, analysis and recommendations . . . . The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

36 C.F.R. § 800.2(a)(3).

***14. What should be the goals and objectives of monitoring, mitigation, and enforcement?***

The goal of the Section 106 consultation "is to identify historic properties potentially affected by the undertaking, assess its effects and *seek ways to avoid, minimize or mitigate any adverse effects on historic properties.*" 36 C.F.R. § 800.1(a) (emphasis added). The NHPA was

enacted to “accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties . . . .” *Id.* To further this goal, the National Trust suggests that MMS develops appropriate stipulations or restrictions when granting leases, easements or rights-of-way.

***15. What types of impacts are of concern? What are effective approaches for mitigating impacts? How can mitigation effectiveness and compliance with Federal environmental statutes be assessed?***

Adverse impacts to historic and cultural properties are the primary concern of the National Trust. Effective approaches for mitigating impacts include consultation through the Section 106 review process to develop and evaluate alternatives or modifications to the project that will avoid or reduce its effects on historic properties. 36 C.F.R. § 800.6(a). Those alternatives and modifications may include, among other things, the physical relocation of infrastructure to alternative sites, reductions in height and density of visible structures, and shielding the visibility of structures from historic properties.

When mitigation measures are agreed upon, Section 106 review typically results in a legally binding and enforceable agreement – a memorandum of agreement or MOA – establishing how the Federal agency will address the adverse effects. 16 U.S.C. § 470h-2(l); 36 C.F.R. § 800.6(c). Each MOA is essentially a custom-tailored mitigation agreement that is enforceable by others besides MMS. In assessing mitigation effectiveness and compliance with Section 106, we encourage the MMS to seek the assistance of the Advisory Council on Historic Preservation, which is specifically authorized to

review the policies and programs of Federal agencies and recommend to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under [the National Historic Preservation] Act.

16 U.S.C. § 470j(a)(6).

***16. What regulatory program elements lead to effective enforcement of environmental requirements?***

MMS should ensure that compliance with NEPA and the NHPA is completed prior to the issuance of leases, easements or rights-of-way. The Section 106 regulations require early consultation with consulting parties in order to properly assess historic preservation concerns with regard to the undertaking. 36 C.F.R. § 800.1(c). This helps to ensure that actions by the agency or the developer will not restrict the consideration of alternatives to avoid, minimize, or mitigate adverse effects on historic properties. *Id.* It also helps to protect applicants from investing in proposed project locations that may prove to be too harmful to sensitive resources.

**Program Area: Coordination and Consultation**

***30. While MMS considers this Advanced Noticed of Proposed Rulemaking an appropriate start at consultation with interested and affected parties, what other efforts could be undertaken at this early stage of program development?***

We commend MMS for soliciting comments on the development of the regulatory program. During this early stage of program development, we encourage MMS to consult directly with the Advisory Council on Historic Preservation, as discussed in more detail under question 15 above.

**Interests of the National Trust**

The National Trust is a private nonprofit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. See 16 U.S.C. § 468. With the strong support of more than 250,000 members and supporters, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition to our headquarters in Washington, D.C., the National Trust operates 25 historic sites open to the public, and eight regional and field offices throughout the country.

The National Trust has also been designated by Congress as a member of the federal Advisory Council on Historic Preservation, which gives the Trust a unique role in the implementation of Section 106. 16 U.S.C. § 470i(a)(8). We have participated actively over the years as a consulting party in a wide variety of Section 106 reviews with many different federal agencies.

The purpose of the Section 106 review is not to prevent the very important process of implementing Alternate Energy-Related Uses on the Outer Continental Shelf. Rather, it is to ensure that MMS fully considers historic preservation issues and the views of the public during project planning and siting decisions. We look forward to our continued involvement with this rulemaking process. Please do not hesitate to call me at (202) 588-6057 should you have any questions.

Respectfully Submitted,



Kate Myers

Assistant General Counsel

cc: Don Klima, Advisory Council on Historic Preservation  
Brona Simon, Massachusetts Historical Commission  
Wendy Nicholas, Northeast Office of the National Trust for Historic Preservation